No. 226

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944.

REPUBLIC AVIATION CORPORATION, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

REPLY BRIEF FOR REPUBLIC AVIATION CORPORATION.

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I.

The Board Attempted to Adduce No Evidence, and There is No Evidence in the Record, to Support Its Conclusion as to the Invalidity of Petitioner's Solicitation Rule.

In our main brief (pp. 11-12) we demonstrated that the determination as to the validity of the solicitation rule requires a careful appraisal and balancing of the public interest in employee self-organization on the one hand and the public interest and the legitimate private interest of the employer in efficient production and employee safety on the other. The Board in effect concedes its duty to

undertake this appraisal and balancing of interests (Br., pp. 17-19). But the Board's strained attempt (Br., pp. 32-37) to show that it has performed its duty in this case signally fails, because (a) the record affords no basis for judging the importance to employee self-organization of solicitation within the plant and (b) the Board has chosen to ignore the abundant evidence of the competing public and private interest in the efficient operation of the plant.

Analysis of the testimony clearly reveals that the Board made no effort to adduce evidence bearing on the importance of intraplant solicitation. This, we submit, was probably because the Board hoped—as indicated by the allegations of the complaint (R. 6) and the nature of the testimony which it did offer—to prove that petitioner designed and enforced the solicitation rule with the deliberate purpose "to frustrate the self-organization of its employees". Indeed, the trial examiner so found (R. 634-637), but the Board very properly reversed his finding as unsupported by the proof (R. 675). Hence the Board was forced to stand upon the bare question of the reasonableness of the rule; and it has obviously endeavored to comb the record for incidental bits of testimony which might make a showing on the question of the importance of solicitation inside the plant. This endeavor was foredoomed to failure, as an examination of the pertinent parts of the Board's brief (pp. 34, 32-33) will show.

In its Statement (Br. 3-4) the Board purports to set forth certain "facts, as found by the Board and as shown by the evidence . . ." Included among these so-called fact-findings are the following:

1: "the employees live at distances ranging from as much as 10 to 50 miles from the plant." (Br. 3) The supporting citations to the record (other than to the trial examiner's report) are:

> (a) *R. 195*, a part of the testimony of Bobrow. The complete disqualification of this testimony, which was a paraphrasing of the rationale of a so-called "Na-

tional Labor Board" in a case involving an entirely different company, and was offered solely to establish the substance of a conversation between Bobrow and Kress, is fully shown in our main brief (pp. 14-15);

(b) *R. 591, 593.* and *605.* These are photostats of personnel records of employees Katz and Stone, prepared contemporaneously with the commencement of their employment, showing an address for Katz in the Bronx, and for Stone in Brooklyn, New York. They indicate that in January 1941, Katz gave his address as the Bronx, and that in July 1942, Stone gave his address as Brooklyn, New York. These dates are respectively two years and nine months prior to the hearing. There is no evidence that these addresses continued; in fact, Katz at the hearing gave his address as Hempstead, Long Island (approximately 11 miles from petitioner's plant, see fn. 1, p. 4).

2. "[The employees'] homes are scattered over a wide area" (Br. 3). The supporting citations to the record comprise, first, the addresses of 6 of petitioner's executives and supervisors (which are, of course, wholly irrelevant, since these individuals do not belong to the employee group referred to) and, secondly, the personnel records above referred to of Katz and Stone, and also of 3 other employees with addresses at various points in Long Island.

3. "Due to gas rationing the normal peace time use of the automobile is drastically reduced and transportation to the vicinity of the plant is difficult" (Br. 4). The supporting citations to the record include the following: *R. 26*, testimony of Industrial Relations Director Wilson that his department handles gasoline rationing and transportation arrangements for the employees; *R. 66*, testimony of Stone that he distributed leaflets to employees outside of the plant gates and at the train platform; *R. 105, 146*, complaints by employee Katz as to congestion on the train platform outside the plant (The testimony of Katz, analogous to that of Bobrow above, was offered merely to prove the substance of a conversation between Katz and em-

ployee Bondy); *R. 194*; a reference by Bobrow to a company bulletin which stated that even during the pleasure-driving ban employees leaving the plant by automobile might stop at petitioner's club house on their homeward journey; *R. 195*; the testimony of Bobrow, which as shown under 1 above, is completely disqualified.

The net content of these miscellaneous odds and ends of testimony may fairly be summarized as follows: Out of the many thousands of petitioner's employees, five (5) individuals are shown to have given at various times addresses at different geographical points;[1] that an indeterminate number of employees traveled to and from the plant by train, while others made the journey by private automobile; and that the use of gasoline for private motoring was rationed. This, plainly, furnishes no possible support for the Board's broad and categorical statements of fact above quoted.

In its Argument (Br., pp. 32-33) the Board reiterates as its findings certain of these unsupported statements of fact; and, to cap the climax, *raises to the dignity of a Board finding* the trial examiner's quotation from the testimony of Bobrow appearing at p. 195 of the record. Since this quotation seems to constitute almost the entire Board case on this issue, we must again point out that this part of Bobrow's testimony was quoted out of its context; that the full context reveals Bobrow as explaining the reasoning of the "National Labor Board", in some undisclosed case; and that his testimony was, in any event, offered solely to establish the substance of an earlier conversation with Kress (See our main br., pp. 14-15). The serious impropriety of citing this testimony as evidence on the issue involved and, *a fortiori*, as a Board finding, is obvious.

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[1] Of these 5 employees, 2 (Kahler and Bobrow) gave addresses in Syosset and Hempstead, Long Island, respectively (R. 597, 601). Reference to a map (cf. Bd. br., p. 3, fn. 3) will indicate that Syosset is approximately 7 air-line miles, and Hempstead approximately 11 miles, from petitioner's plant.

It was patently the Board's duty and not petitioner's to adduce evidence as to the relative ease or difficulty of solicitation outside the plant. There is proof in the record—to which the Board gives no weight—that distribution of F. A. W. literature was freely carried on outside the plant gates and at the train platform[2] (R. 66, 102, 138-139, 176, 183, 206); that meetings of the U. A. W. were being held at its nearby Farmingdale headquarters (R. 66, 102, 183, 210, 237, 622); and that many athletic and social functions for the employees were frequently occurring at petitioner's nearby Farmingdale clubhouse and in neighboring communities (R. 194, 612-614). These and numerous other avenues of inquiry suggest themselves, including a realistic effort to find out where the great body of employees in fact lived, what means of transportation were available to them, and what their social habits were. But the Board did not choose to investigate these factors, evidence concerning which would be indispensable to its proper determination of the issue.

In the light of the foregoing, the conclusion is inescapable that any attempt by the Board to examine in this case "the extent to which enforcement of petitioner's no-solicitation rule would deprive employees of opportunities for self-organization" (Bd. br., p. 32) would be wholly futile.[3]

[2] In its Brief in the *LeTourneau* case (No. 452, this Term), the Board argues that if distribution of union literature (which is, of course, one type of solicitation) may be readily effected outside an employer's plant, the use of the employer's property for the purpose "is not, of course, indispensable to the full exercise of [the employees'] rights under the Act" (Br., p. 17). In such a case, the Board continues, if this form of solicitation would impose any "inconvenience, risk or damage" upon the employer, the Board will find that protection of the employees' statutory interests does not require that this type of solicitation be permitted, citing *Matter of Tubin-Picker & Co.*, 50 N. L. R. B. 928.

[3] As noted in our main brief (p. 16), the court below recognized that the Board here "did not take evidence upon the issue" of the competing priorities (R. 712, 713). The Board's suggestion that the court "apparently overlooked" the so-called findings in the trial examiner's report (Br., p. 40) is, we submit, an unwarranted traducement of the lower court's intelligence and awareness.

We have already shown (main br., pp. 12-13) that a proper appraisal of the "competing priorities" was not and could not have been made by the Board in the other cases cited in its decision here (R. 689) in which its doctrine respecting intraplant solicitation was evolved. Consequently, contrary to the Board's assertion (Br. pp. 41-42), it cannot avoid the effect of this Court's decision in *Eastern-Central Motor Carriers Ass'n.* v. *U. S.*, 321 U. S. 194 (main br., pp. 17-18). And as this Court said in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80 (cited by the Board, Br. pp. 18-19) at p. 94:

> "The orderly functioning of the process of review requires that the grounds upon which the administrative agency acted be clearly disclosed and adequately sustained. "The administrative process will best be vindicated by clarity in its exercise." *Phelps Dodge Corp.* v. *Labor Board*, 313 U. S. 177, 197.

II.

Petitioner's Solicitation Rule Did Not Bar Free Discussion by Its Employees of Unions and Their Affairs.

As already shown (main br., pp. 3-4), petitioner did not seek through the solicitation rule to limit full and free discussion by the employees on any subject, union or otherwise. In other words, the employees were at perfect liberty to talk about the need of financial support for the Red Cross or about the virtues of the American Legion or the U. A. W. In petitioner's view, the point where friction and discord naturally tended to develop was the point at which ordinary discussion passed into the realm of personal pressure tactics designed, for example, to exact from an employee a contribution to charity or his pledge of adherence to a given organization. Contrary to the Board's assertion (Br., p. 37), we submit that petitioner's policy was a wholly realistic one based on fundamental principles of human psychology. This is not to say that ordinary discussion of union and other affairs may not occasionally give

rise to bitter dispute. But the flash point is obviously far more likely to occur when pressure is applied to induce an affirmative change in the employee's position.

Petitioner's policy on this point is by no means at odds with the rationale of the National War Labor Board in *Matter of General Chemical Co.*, 3 War Lab. Rep. 387 (cited by the Board, Br. pp. 25-26). The opinion in that case states (p. 396):

> It is most natural that when a group of employees sit down together during the lunch hour or meet in the locker room prior to going on duty or meet together at other times and places, even though on company property, one topic of conversation is likely to be the activities of the union . . .
>
> The non-union member, in turn, is entitled to protection from coercion and threats on the part of union members who may seek to impose upon him union discussions to which he does not care to listen.

This reasoning is entirely in accord with petitioner's policy of permitting free *discussion* of union affairs in the plant, but of protecting the non-union employee from pressure or coercion on the part of union adherents. In the *General Chemical* case, the War Labor Board rejected the recommendation of its panel that the collective agreement prohibit union activities "on works property" and limited the prohibition to working hours. But, as noted in our main brief (pp. 23, 24-25), in the *General Chemical* case the employees were already organized and the employer was engaged in collective bargaining with the union representing them—a situation in which solicitation is far less likely to create friction and discord than when the employees are still in an unorganized state.

III.

The Wearing of U. A. W. Steward Buttons Constituted a Misrepresentation of the Status of the Wearers in Petitioner's Plant.

The Board has misstated or misconstrued in an important respect petitioner's position concerning the wearing in its plant of U. A. W. steward buttons. The Board asserts (Br., p. 44) "petitioner posits its entire case on this issue on the contention that the existence of union shop stewards in a plant inevitably implies that the labor organization has been accorded recognition by management". Petitioner made and makes no such contention. It did not deny the right of the U. A. W. for its internal purposes to give to the employees involved any title it chose (cf. main br., p. 30). What petitioner did assert and the Board does not deny is that the characteristic and recognized function of a steward in modern labor relations is the adjustment with management of employee grievances (main br., pp. 29-30). While unions may designate employees as stewards to perform intraunion functions prior to recognition of the union by the employer, it is only *after* such recognition that the characteristic function of grievance adjustment may attach to the steward's office. The employees here involved were not stewards in this characteristic sense; in the plant and *vis-à-vis* management they were simply U. A. W. organizers. Nevertheless, they insisted on displaying in the plant badges representing themselves as stewards without qualification. This was a palpable misrepresentation of their status in the plant; and for the reasons set forth in our main brief (pp. 30-32) petitioner was wholly justified in insisting that the misrepresentation cease forthwith. As shown in our main brief (p. 5), petitioner formulated its policy in this matter only after careful consideration and consultation with counsel.

Conclusion.

It is respectfully submitted that the decree below should be reversed.

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